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No. 25161-6-III

(Douglas County Superior Court No. 05-2-00235-0)

IN THE COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DON L. FITZPATRICK and PAM FITZPATRICK, husband and wife; BRAD STURGILL and HEATHER FITZPATRICK STURGILL, husband and wife,

Appellants.

vs.

OKANOGAN COUNTY; THE STATE OF WASHINGTON; JOHN L. HAYES and JANE DOE HAYES, husband and wife; and METHOW INSTITUTE FOUNDATION,

Respondents,

APPELLANTS' REPLY BRIEF

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A. There Were Genuine Issues of Material Fact Regarding the Common Enemy Doctrine Rendering Summary Judgment Inappropriate.

The parties agree that the common enemy doctrine provides a defense for blocking surface waters in certain circumstances.[1] The parties disagree, however, over whether the dike repelled surface waters in this case. Respondents argue that waters overflowing from a river in flood time are surface waters. County's brief at 5; State's brief at 7. The uncontested evidence shows that the dike did not repel surface waters but, in fact, blocked the flow of natural side channels and drainways. Defendants have never offered any evidence to dispute this evidence.[2] Indeed, any contrary evidence would merely have established disputed issues of material fact rendering summary judgment inappropriate.

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[1] The County claims that it is "ironic" that Appellants have protected their own property by placing riprap on the bank of their property to prevent further damage after the avulsive event, arguing that Respondents have this same right under the common enemy doctrine. County's brief at 8, n.2. The obvious difference between Appellants' actions and Respondents' actions are that in placing the riprap on the bank of their property, Appellants have not blocked a watercourse or natural drainway, nor have they damaged anyone else's property.

[2] The County and State argued in their summary judgment motions that Appellants had failed to establish the essential elements to support their inverse condemnation claim against Defendants, but failed to brief this argument below or on appeal. CP 18; CP 75. Appellants, however, did brief this issue showing that they established the essential elements of an inverse condemnation claim. Opening Brief at 8-11.

1. The Common Enemy Doctrine Does Not Apply to a Dike That Blocks a Natural Watercourse.

The County and State argue that the common enemy doctrine is always available as a defense for the construction of dikes and levees designed to prevent floodwaters from escaping the banks of a river citing *Cass v. Dicks*, 14 Wash. 75, 44 P. 113 (1896) and *Halverson v. Skagit County*, 139 Wn.2d 1, 938 P.2d 643 (1999). That is true if the waters are surface waters. However, waters escaping the banks of a river and flowing into a defined channel are not surface waters. *Sund v. Keating*, 43 Wn.2d 36, 42-43, 259 P.2d 1113 (1953). In this case, the evidence is undisputed that the waters held back from the dike were riparian waters that would otherwise have flowed through natural side channels.

Respondents contend that case law discussing the exception for blocking a natural watercourse do not apply if the factual scenario of the case involves a dike or levee. Defendants are wrong. None of the cases discussing the common enemy doctrine have ever ruled that a natural watercourse may be blocked by a dike. Respondents argue that *Halversen* and *Cass* are directly on point, but they fail to mention that both of those cases noted there was **no evidence that the dike blocked a natural watercourse**, unlike this case. *See Cass*, 14 Wash. At 77-78 ("The water which passes from the premises of appellants does not flow in a defined

channel having a bed and banks, and, consequently, is to all intents and purposes surface water"); *see Halversen*, 139 Wn.2d at 14, n. 14 ("[T]here is no evidence in the record that the overbank floodwaters flowed within a defined flood channel."). Respondents' failure to address those distinguishing facts is fatal to their argument.

The County and State also argue that Plaintiffs' reliance on *Sund v. Keating*, 43 Wn.2d 36 (1953) is misplaced because it does not involve a dike or levee. County's brief at 9; State's brief at 9. The County and State argue that the Court held that the damaged property owner in that case should have built a dike to prevent the damage to his property. While the Court did state that the damaged landowner in that case had refused to take the precautions suggested to them, such as building a bulkhead to retain the banks of the stream, the Court did not advocate that the landowner should have blocked off a natural watercourse by building a dike.

Respondents concede, as they must, that the common enemy doctrine is not applicable where a dam or other obstruction blocks the flow of a natural river or watercourse, but Respondents fail to explain why a dam is any different from a dike. County's brief at 8. The lack of an explanation is because there is no principled reason why dikes should be treated differently. The common enemy doctrine allows a landowner to

protect against diffuse surface waters, but it does not allow blockage of a natural watercourse, either by a dike or any other form of blockage.

The defendants here are asking this Court to create a new exception that allows natural watercourses to be blocked off under the common enemy doctrine. A correct reading of the case law and understanding of the principles underlying the common enemy doctrine do not allow such a conclusion. The evidence in this case is undisputed that the County and State in constructing and improving the dike blocked a natural watercourse. Summary judgment was contrary to law.

2. Granting Summary Judgment Is Reversible Error

Relying upon *Snohomish County v. Postema*, 95 Wn. App. 817, 978 P.2d 1101, *review denied*, 139 Wn. 2d 1011 (1998), Appellants contend that the granting of summary judgment to the Respondents in this case was reversible error. Appellants' brief at 21-22. The County and State wrongfully reject the applicability of *Postema* since the case did not involve a dike. County's brief at 10-11; State's brief at 10. *Postema* is clearly analogous to this case, regardless of whether it involved the presence of a dike.

The County argues that "[i]nexplicably, Fitzpatrick argues that in *Postema* 'there was a factual question of whether the upstream owner

blocked a natural watercourse or surface water." County brief at 10. The County claims this is statement is simply false, but the County is wrong. The Court of Appeals in *Postema* clearly held that since the downstream property owner raised a factual issue as to the classification of the water, summary judgment was inappropriate.

> Only if the waters are determined to be "surface waters" are the Postemas entitled to seek the shield of the common enemy doctrine. The determination of what classification of water is involved is a question for the trier of fact and should not be taken from "the jury." There are disputed issues of material fact and summary judgment should not have been granted.

Id. at 821-22.

In the present case, Appellants have presented expert testimony as to this issue. At a minimum, Appellants met the burden of raising a genuine issue of material fact and summary judgment should not be granted.

3. The Exception to the Common Enemy Doctrine Applies to Both Downstream and Upstream Property Owners.

Respondents continue to argue that the exception to the common enemy doctrine for blocking the flow of a natural watercourse only applies when a downstream property owner obstructs the flow to cause damage to an upstream owner's property. County's brief at 10; State's brief at 10. But, there is **no basis** in case law, nor any reasonable rationale, for this

distinction. While Respondents do point to cases where the doctrine has been applied to downstream property owners, that does not mean that its applicability is limited to those factual scenarios. Indeed, Appellants cited a case applying the doctrine to a lower landowner who obstructed the flow of an upstream property owner, but Respondents distinguished the case on the played out argument that the case did not involve a dike.

Appellants cited *Snohomish County v. Postema* for the proposition that the doctrine applies to both downstream and upstream property owners. In that case, an upper landowner caused damage to a downstream property owner. Respondents argue that *Postema* is factually distinguishable since it did not involve construction of a dike. State's brief at 10. There is no basis in case law for applying a different analysis under the common enemy doctrine to cases depending on the presence of a dike.

The County and State's characterization of *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 626 (1999), also defeats their argument that the common enemy doctrine does not apply to both upper and lower landowners. Although the County and State once again attempt to distinguish *Currens* on the basis that it did not involve a dike, the State and County both recognize the case involved an upland property owner who caused damage to a lower landowner. State's brief at 10; County's

brief at 10. If Respondents' position was correct, the Supreme Court would not have analyzed that case under the common enemy doctrine.

Importantly, Respondents fail to respond to Appellants' argument that there is no principled basis for limiting the exception to damaged owners who happen to be upstream from the blockage. The lack of response is because the location of the damaged property has no bearing on the classification of the waters within the channel. Accordingly, there is no basis in the common enemy doctrine, or its exception, for distinguishing damages that occur downstream from those that occur upstream.

Respondents' distinction for applying the common enemy doctrine dependent on the location of the damaged property should be rejected. Summary judgment cannot be upheld on this basis.

4. The Common Enemy Doctrine Will Not be Devoured by Appellants' Interpretation that the Defense is Not Available if a Landowner Blocks a Natural Watercourse

Respondents complain that Appellants' interpretation would devour the common enemy defense.[3] State's brief at 12; County's brief at

[3] The County claims that the trial judge in oral remarks at the summary judgment hearing stated that the common enemy doctrine should not be eviscerated in dike cases simply because floodwaters escaping from the banks of a river will find low ground and tend to flow in channels or depressions. County brief at 16. This is just what the County recollects about the hearing and since none of the parties requested the transcript, the Court should ignore the County's characterization of the trial court's oral remarks

16. Respondents wrongly claim that under Appellants' analysis, "anytime floodwaters escape the banks of a river finding low ground, depressions or channels in which to flow" an individual would no longer be protected from liability to build a dike. State's brief at 13. This is not an accurate statement of Appellants' position in this case, nor the facts of this case.

Appellants' expert, Dr. Bradley, concluded that the dike blocked water from accessing and releasing through **the natural defined side channels** of the Methow River, and were not merely surface water that would normally flow to low ground or depressions. A Department of Ecology hydrogeologist confirmed Dr. Bradley's testimony. CP 254-255. The evidence directly contradicts Respondents' unsupported position that these are historically "dry channels" or the incidental blocking of "old flood channels (with no water flowing in them)."[4] State's brief at 13, 15.

Importantly, Respondents offered no evidence to contradict Dr. Bradley's testimony. Without any expert testimony to contradict Dr. Bradley's testimony, counsel for Respondents attempt to serve as "experts" in this case. Respondents' counsel, however, are not qualified to

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because it has not been verified and it is irrelevant since this case was decided on summary judgment.

[4] The County and state characterize the side channels as "dry flood channels" or the blockage of "old flood channels (with no water flowing in them)" but this is misleading. County's brief at 11, 15; State brief at 13. Respondents miss the point. As explained by Dr. Bradley, the side channels are currently dry because the dike has blocked these side channels, preventing the river from accessing them. CP 133.

dispute Dr. Bradley's evidence. Even if counsel were qualified to dispute this evidence, it would merely raise issues of material fact rendering summary judgment inappropriate.

Specifically, the County's attorney comes up with his own theory of the issue in this case.

> The fact that overtopping waters may temporarily flow in channels and swales does not change the result. The Washington courts have recognized, as they consistently sustain the common enemy defense in diking cases, that the ground in a floodplain (or indeed anywhere in the real world) is not perfectly smooth like a billboard table. Especially in a forested area like the Methow riparian corridor, the ground is always uneven to some degree. Thus, when the water escapes the banks of a river, it will naturally flow first to those areas which are depressions in the ground surface. It is only as flood levels rise further that floodwater spreads out across the entire floodplain. But this simple principle of physics surely does not warrant overthrowing the well-settled common enemy defense.

County's brief at 16-17; *see also* State brief at 13. Of course, counsel for the County has no citation for making these statements because they are merely his unsupported "theories." Counsel's theories should be rejected since there is no evidence to dispute Appellants' highly qualified expert that these are natural side channels.

Furthermore, it is unbelievable that Respondents would complain that Appellants' position would devour or eviscerate the common enemy doctrine. The common enemy doctrine is after all a defense. In this case,

Respondents have conceded that the dike they constructed as a public project permanently destroyed Appellants' house and a significant portion of the underlying property. Respondents are unapologetic for this loss. Sadly, Respondents are more concerned about getting out of liability on a technicality that has never been applied to someone who blocks a natural watercourse.

Contrary to what Respondents argue, Appellants' would not devour the common enemy defense for cases involving dikes. Governmental entities would still be able to rely upon the common enemy doctrine if the evidence established that that the landowner had blocked *surface waters*, as distinguished from *riparian waters* flowing within a defined stream. This is consistent with *Cass*, *Sund*, and *Halverson*. Unfortunately for Respondents' in this case, those are not the facts here as established by the uncontested testimony of Dr. Bradley and Al Wald, a hydrogeologist for the Washington State Department of Ecology. CP 254-255.

Appellants' position is simply that the Court should apply the common enemy doctrine as it has always been applied in Washington. No Washington cases permit a landowner to avoid liability when they have blocked a natural watercourse. Even Respondents were unable to find a case where the defense was available to someone who blocked a natural

watercourse. Summary judgment was contrary to law.

5. The Law of Riparian Rights is Not Applicable to This Case.

The County and State raise a "red herring" argument on appeal for the first time that should be rejected. The County and State argue that Appellants claim that this case should be reviewed under the "law governing riparian rights."[5] County's brief at 12 and 13; State Brief at 12 ("plaintiffs urge this Court to analyze this case under the law governing riparian rights"). This quotation is not accurate. Appellants have never argued that the law of riparian **rights** should govern this case. The Court should reject this argument based on misquotation from Appellants' brief. Moreover, this argument should be rejected since it is being raised for the first time on appeal. RAP 2.5(a).

The County misquotes Appellants' Opening Brief at pages 12 and 13. Nowhere do Appellants state that the case should be governed by the law of "riparian rights." Indeed, the word "right" or "rights" is never used on those two pages. Under the doctrine of riparian rights, an owner of land on a stream or other body of water has the right to use the water. *Crook v. Hewitt*, 4 Wash. 749, 31 P. 28 (1892). This case has never been

[5] The County also argues that *Sund* is distinguishable because the plaintiff in that case lived along the watercourse which defendant had altered. County's brief at 18. Just like this case, *Sund* dealt with the issue of riparian waters, not riparian rights. This is not a valid basis for distinguishing *Sund*.

about the right to use the waters in this case.

Appellants' brief does discuss the law on whether waters are properly classified as surface waters or **riparian waters** for purposes of the common enemy doctrine, but that has nothing to do with the law of riparian rights. The Court should not be misled by Respondents' blatant effort to confuse the Court with similarly named, but unrelated doctrines, and by misquoting Appellants' Opening Brief.

B. There Were Genuine Issues of Material Fact Regarding The State's Role in the Dike

The State argues that it cannot be liable for Appellants' damages in this case under *Halverson* because it did not have an active role in the dike improvement. State's Brief at 5. The State wrongly claims that "the undisputed facts" are that the "State did not own, plan, construct, operate, maintain or design the dike." State's brief at 1. However, the evidence shows that the State government activity resulted in construction of the dike. At a minimum, there were at least genuine issues of material fact regarding the State's role in the construction, improvement, maintenance, and ownership interest in the dike rendering summary judgment inappropriate on this basis.

The undisputed evidence in this case shows that the dike was constructed as a public project and that the State was a key participant.

See Agreements between State and County regarding dike improvement attached as Exhibits B (CP 174), C (CP 176-177), D (CP 179-180), E (CP 182-184), and F (CP 186-195) to Kirchheim Decl; *See also* Declaration of David Schultz at 1-2 (CP 93-94) ("the dike had been constructed or improved in the mid-1970s by Okanogan County and the state of Washington, to protect nearby properties, including Highway 20, from flood damage in high water events."). The first Agreement between the State and County dated June 30, 1975 states that the State and County will construct a "protective dike" for flood control maintenance. *See* Exhibit B attached to Kirchheim Decl. at CP 174. The Agreement spells out that the construction will be performed by the County subject to the approval of the Director of Ecology. The State also entered into Agreements with the County in October of 1975 and December 19, 1978 for dike improvements and modifications. *See* Exhibits C (CP 176-177) and D (CP 179-180) to Kirchheim Decl. Indeed, the evidence shows that government activity resulted in construction of the dike. Notably, the State did not challenge any of this evidence below.

Again, Defendants' reliance on *Halverson* is misplaced. In *Halverson*, the county was not liable for levee-induced flooding because the County did not build, own, or manage the levee. Rather, the levee was built and controlled by an independent diking district. *Halverson*, 139

Wn.2d at 13. Accordingly, the facts in the present case are clearly distinguishable from *Halverson* since the State and County made the dike improvements here.[6]

Clearly, at a minimum, there were genuine issues of material fact regarding the State's responsibility for the dike rendering summary judgment under *Halverson* improper. Summary judgment cannot be upheld on this basis.

C. A Taking Does Not Require That it Be Contemplated.

The County continues to make the ridiculous argument that it cannot be liable for any damage that occurred to Appellants' property because such damage was not "contemplated" when the dike was constructed. County's brief at 22-28. The State has joined this argument for the first time on appeal. State's brief at 15-18. In other words,

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[6] While sufficient evidence was presented to show that the dike was constructed as a public project, Appellants did recognize below that ownership of the dike, or the underlying land, was subject to competing positions by the Respondents. CP 121. For example, the County conceded that the dike is used as part of a public recreation trail and that it received right-of-way deeds for the trail in the early 1990s. *See* County's Response to Plaintiffs' First Set of Interrogatories and Requests for Production attached as Exhibit J to Kirchheim Decl. CP 206-209. Defendant Hayes claimed he deeded the property underlying the dike to Defendant Methow Institute Foundation who in turn deeded the land to the County and State around 1993. *See* Hayes' Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents, attached as Exhibit K to Kirchheim Decl. CP 212. In addition, the 1999 permit application to repair the dike states that the "County of Okanogan is the co-owner of the subject property together with the State of Washington. The property was deeded from private individuals to the County of Okanogan and the State of Washington for a non motorized trail." *See* Exhibit F to Kirchheim Dec. at CP 186. Because of these competing positions, Appellants argued the hearing should be continued under CR 56(f) so that Appellants could conduct additional discovery regarding ownership issues. CP

Respondents claim they should not be held responsible for destroying Appellants' home and property because they did not intend to cause the damage. Not only is this a weak excuse to avoid liability, but one without merit.

Respondents rely upon *Jorguson v. City of Seattle*, 80 Wash. 126, 141 P.334 (1914). The problem with relying upon *Jorguson* and the subsequent cases that follow it is that it has been called into doubt by *Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 P. 645 (1927) and its overruling recognized by *Lambier v. City of Kennewick*, 56 Wn. App. 275, 783 P.2d 569 (1989), *review denied*, 114 Wn.2d 1016 (1990).[7] In *Wong Kee Jun*, the Court overruled the attempt to draw the distinction set forth in *Jorguson*.

> [T]he only inharmony arises from the *Casassa* and *Jorguson* cases and those which attempt to follow them. In the beginning they were a not unjustified attempt to draw a distinction which does exists, but the line drawn was too fine, and the results show that it leads to confusion. So far as out of harmony with what is here said, those cases are **overruled**.

Id. at 505 (emphasis added). Respondents offer no response to this language in *Wong Kee Jun*.

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[7] The County disputes that *Jorguson* has been overruled, but anyone who keycites the case on Westlaw can see the red flag citing *Wong Kee Jun* and *Lambier*.

Furthermore, the County claims that *Lambier* was wrongfully decided and factually distinguishable since the taking was not a result of flooding.[8] County's Brief at 24. While the County may personally think the case was wrongfully decided, unlike *Jorguson*, no court has questioned it and it remains good law. Furthermore, the fact that the case did not involve flooding does not diminish its holding that a taking need not be contemplated.[9] Indeed, there is no basis for arguing that damages must be contemplated in taking cases involving flooding, but not in taking cases arising under a different set of facts.

The County also argues that *Jorguson* is still good law by relying upon *Olson*. County's brief at 23, 25. The County looks to *Olson* for support because the property damage there was found to be the result of tortious conduct. Contrary to any implied suggestion by the County, *Olson* affirmed the principles of *Wong Kee Jun*.

> Concededly this distinction between a constitutional taking and damaging and tortuous conduct by the state or one of its subdivisions is not always clear. But

[8] Notably, *Lambier* also held that *Seal* and *Songstad*, two cases cited by Respondents, were factually distinguishable from *Jorguson*. *Id.* at 280. First, it noted that in *Seal*, there was not an affirmative act of construction which directly resulted in damage to property, so the claim was more appropriate as a tort. *Id.* The *Lambier* Court also factually distinguished *Songstad* on the fact that the damages were not permanent, but were merely a temporary interference with their property interests. *Id.* Neither of those distinguishing facts in present in this case. *Lambier* went on to recognize that both *Seal* and *Songstad* mistakenly rely on *Jorguson*. *Id.* at 281.

[9] It is ironic that the County would argue that *Lambier* has no applicability to this case because it was not a flooding case, but argue that *Olson*, also not a flooding case, is analogous to this case.

> subsequent to our comprehensive analysis of our cases by Judge Tolman in *Wong Kee Jun v. City of Seattle*, supplemented by Judge Steinert's scholarly discussion in *Boitano v. Snohomish County*, we have adhered fairly closely to the principles enunciated in those cases.

71 Wn.2d at 284.

In short, *Olson* does not resurrect the negligence distinction or inadequate plan rule of *Casassa* and *Jorguson*. It simply recognizes that in some situations, a government may act negligently and cause temporary interference and damage without resulting in a taking of the land. However, the *Olson* case provides no legitimate basis for Respondents to contend that its **permanent** destruction of Appellants' home and property, as a direct result of its construction of the dike, is not a compensable taking. *Olson* does not support Respondents' position.

In a new twist on this argument, Respondents argue for the first time on appeal that a taking requires that it not only be contemplated but "necessarily incident to" the government project. Respondents rely upon a recent Supreme Court decision, *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005) to make this argument. County's brief at 25-26; State's brief at 17. Respondents boldly claim that *Dickgieser* lays to rest any uncertainty whether an inverse condemnation claim requires a showing that an inverse condemnation claim require a showing that damage be necessarily incident to, or contemplated by the government project.

County's brief at 25; state's brief at 17. Contrary to Respondents' assertions, *Dickgieser* does not support their case, but actually supports Appellants' inverse condemnation action.

Dickgieser involved logging of state owned property by the Washington Department of Natural Resources (DNR). By removing large quantities of mature timber, the natural drainage of surface water from the area was significantly altered. As a result of that logging operation, a stream subsequently overflowed its banks and destroyed three homes on Dickgieser's land. Dickgieser brought an action against DNR, including an inverse condemnation claim, contending that the DNR logging operation that destroyed his property constituted a "taking" for which compensation was due under Article 1, section 16 of the Washington Constitution. The State argued that DNR's logging operation was negligently implemented (i.e. tortious conduct), but the resulting damage was not a taking under Article 1, section 16.[10]

Respondents' reliance on *Dickgieser* ignores the holding in the case. The Supreme Court rightfully rejected the State's argument that the action sounded in tort and held that the permanent destruction of Mr. Dickgieser's home was a negligence claim. Importantly, the case says

[10] The State's motive in *Dickgieser* for attempting to characterize DNR's logging project as resulting in a tort, rather than a taking of private property, was to avoid liability since the statute of limitation had passed on the tort claims. *Id.* at 533-34.

nothing about a requirement that a taking be contemplated. Respondents have taken statements in the case out of context which were not relevant to the decision.[11]

Respondents argue that the damage to the Appellants' property was not contemplated when the dike was built as evident by the fact that it took 27 years for the damage to occur after the dike was constructed. State's brief at 15; County's brief at 28.[12] The undisputed evidence below by Appellants' expert explains why the avulsive event occurred in 2002. Specifically, Dr. Bradley noted the presence of several "naturally defined side channels, or watercourses" in the right floodplain of the Methow River in the vicinity of the dike that relieve flow from the main channel as the water level rises during a high flow event. Declaration of Bradley at ¶6 at CP 132-133. Dr. Bradley continued:

> In this section of the Methow River, it is clear that **one by one** the side channels in the right floodplain were blocked off with the construction of the dikes beginning in **1975 through the 1999** COE flood fight.

Declaration of Bradley at ¶7 (emphasis added) at CP 133. Thus, the avulsion occurred in 2002 because it was inevitable after all the side

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[11] The County and State cite to language reciting the facts in the case, but this was not the holding of case. County's brief at 25; State's brief at 17. Indeed the County's quotation regarding *Olson* was merely repeating the State's argument in the case and was not affirmed by the Court.

[12] The State wrongfully claims that the meander course of the Methow River did not change for 26 years. Dr. Bradley's aerial depictions show otherwise. CP 151-155.

channels had been blocked from dike improvements spanning from 1975 to 1999.

The Court should reject Respondents' weak attempts to circumvent liability based on the "I didn't mean to defense." There is no such defense to an inverse condemnation action.

D. Tort Immunity Statutes Do Not Preclude Inverse Condemnation Liability.

The State and County each argue that they are immune from inverse condemnation liability in this case by **statute** because the dike was constructed for flood control purposes. Okanogan's Brief at 18-22; State's Brief at 14-15. The immunity statutes cited by the County and State, however, only apply to tort claims and do not bar the inverse condemnation claim based on the State Constitution. *See Halverson*, 139 Wn.2d at 12 (noting that immunity under tort immunity statute does not apply to claims based on constitutional grounds). Summary judgment cannot be upheld on this basis.

The County and State distinguish the holding in *Halverson* on the grounds that tort immunity is inapplicable only when the alleged violation is solely based on constitutional grounds and here Appellants plead tort claims as well as constitutional claims. County's brief at 20; State's brief at 15. Respondents' argument is illogical. There is no rational basis for

tort immunity to preclude actions based solely on constitutional grounds, but if tort and constitutional claims are both plead, all claims, including the constitutional claim, are barred by tort immunity.

Halverson is based on case law holding that immunity does not extend to state constitutional claims under article 1, section 16.

> RCW 86.12.037 does not affect fundamental rights. The statute does not prohibit recovery under U.S. Const. Amends. 5 or 14 or Const. Art. 1, § 16 where a person's property is taken for a public purpose by a county in the exercise of its police powers.

Paulson v. Pierce County, 99 Wn.2d 645, 652, 664 P.2d 1202, *appeal dismissed*, 464 U.S. 957 (1983); *see also Deaconess Hospital v. State of Washington*, 10 Wn. App. 475, 480, 518 P.2d 216 (1974) ("the legislature may not substantially impair article 1, section 16 rights, nor place an unreasonable burden on their exercise"). The County and State have no response to *Deaconess Hospital* or *Paulson*.

The County continues to rely on *Short v. Pierce County*, 194 Wash. 421 (1938) to argue that if both inverse condemnation and tort claims are raised, all claims are barred by the immunity statutes. County's brief at 20-22. However, the County ignores the fact that the Supreme Court in *Short* did not hold that immunity was available for all the claims, including an inverse condemnation action. The County downplays this portion of the decision by saying the Court only allowed a

"narrow inverse condemnation" claim, but this distinction does not change the fact that the *Short* Court did not apply the tort immunity statute to one of the inverse condemnation claims. County's brief at 21. If tort immunity statutes preclude all claims when both torts and inverse condemnation claims are raised, the *Short* Court would have dismissed all claims in the case.

Desperate to secure immunity for destroying Appellants' home and property, the County and State now argue that appellants' inverse condemnation is properly characterized as a tort action. Their basis for making this argument is by wrongly claiming that Appellants' expert offered evidence that Respondents negligently constructed the dike in the wrong location. County brief at 22; State brief at 15. First of all, this argument should be rejected as being raised for the first time on appeal. *See* RAP 2.5(a).

Second, the County and State have twisted Appellants' expert testimony. Appellants' inverse condemnation claim is not based on negligence. Indeed, nowhere have Appellants plead or argued that the County and State **negligently** located the dike.[13] Instead, Appellants'

[13] The County cites CP 147 and Appellants' Opening Brief at page 19, but those citations reject Respondent's argument. Indeed, CP 147 is part of Dr. Bradley's report and nowhere on that page is there any mention of negligence. The same is true for page 19 of Appellants' Opening Brief. Appellant did not allege or brief that the dike was negligently constructed.

expert concluded that in constructing/improving the dike, the County and State blocked the flow of natural side channels and drainways and the blockage of these channels resulted in the avulsive event that damaged Appellants' property. It is true that Appellants' expert did note that the County and State could have placed the dike in a different location that would have prevented the avulsive event. Appellants' Opening Brief at 19-20. However, that evidence was not introduced to argue that the dike was negligently constructed, but introduced to show that if that different location for the dike had been chosen, the side channels would not have been blocked and the common enemy defense may have been available if the dike caused damage by repelling surface waters.

Third, Respondents' argument goes to causation, but they have still not offered **any** evidence to dispute that the dike destroyed Appellants' home and property.[14] If Respondents want to challenge causation, they need to produce evidence that the dike was negligently constructed. Respondents' weak attempt to circumvent liability should be rejected.

In summary, the legislature cannot enact legislation granting immunity to the government from the requirements of the State

[14] The County and State contend that a logjam contributed to the avulsive event. State brief at 1, 3; County brief at 28. Appellants have not argued that the logjam was the proximate cause of Appellants' damage. Moreover, contrary to Respondents' assertions, Appellants have not conceded that the State or County could have no liability for failure to remove the logjam. That issue was not briefed because there was no evidence

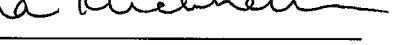
Constitution. Summary judgment cannot be upheld on the grounds that tort immunity statutes preclude inverse condemnation claims.

CONCLUSION

The uncontested evidence below is that the cause of Appellants' loss (permanent destruction of their home and land) was due to a dike completed as a public project along the Methow River. In order for the summary judgment motion to be upheld on appeal based on the common enemy defense, the trial court must have had before it undisputed evidence that the waters blocked by the dike would have been surface waters, however, there was no such evidence in this case. To the contrary, the only evidence was expert testimony that the waters held back by the dike were riparian waters that would have otherwise flowed through the natural side channels. Granting summary judgment was contrary to the law and should be reversed.

RESPECTFULLY SUBMITTED this 28th day of August, 2006.

GROEN STEPHENS & KLINGE LLP

By: 

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introduced that the logjam was the proximate cause of damage.

DECLARATION OF SERVICE

I, Linda Hall, declare: I am not a party in this action. I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP of Bellevue, Washington.

On August 28, 2006, a true copy of Appellants' Reply Brief was placed in envelopes, which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United State Postal Service in Bellevue, Washington addressed to:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 28th day of August, 2006 at Bellevue, Washington.

Linda Hall